

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NOS. C-090172
		C-090173
Plaintiff-Appellee,	:	TRIAL NOS. B-0808657
		B-0808864
vs.	:	
		<i>JUDGMENT ENTRY.</i>
COURTNEY WILKINS,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Courtney Wilkins appeals his convictions for robbery. We conclude that Wilkins’s assignments of error do not have merit, so we affirm the judgment of the trial court.

Wilkins was indicted for two counts of aggravated robbery with gun specifications and two counts of robbery. The cases were tried to the court. During the trial, Carol Metz testified that on October 24, 2008, she was working as a cashier at a CVS drug store in Colerain Township when a man approached her counter and told her that he had a gun. He demanded money from her, stating that she had “better give him the money, he didn’t want to hurt nobody.” Metz testified that the man had his hands in the pocket of his sweatshirt and that she believed that he had pointed a gun at her through the pocket of the sweatshirt. According to Metz, she gave him money from her cash register, and he walked out of the store. Metz

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

identified Wilkins in a police photograph array and at trial as the man who had taken the money.

Pizza Hut employee Rebecca Siegel testified that, three days later, she had noticed a man acting suspiciously outside the restaurant on Colerain Avenue in Colerain Township. After she had pointed the man out to her manager, the man left. Approximately 15 minutes later, a masked man wearing the same clothes as the suspicious man came into the Pizza Hut, went to the back office, and said, “[G]ive me the money, I have a gun[.]” According to Siegel, the man had his hand in his pocket. Siegel testified that based on the man’s statements and the way that he had held his hand in his pocket, she believed that he had a gun. Tom Henson, general manager of the Pizza Hut, gave the man money from the safe. Siegel and Henson identified Wilkins as the man who had come into the Pizza Hut. Candice Horigan, the district manager of the Pizza Hut restaurant, was in the office when the man came in. She also identified Wilkins as the man who had taken the money.

Shortly after receiving a report of a robbery at Pizza Hut, Detective Darren Sellers and Officer Otis Wellborn stopped Wilkins as he was walking down Colerain Avenue. Sellers testified that Wilkins matched the description of the suspect. After Wilkins was taken into custody, the officers found a wad of money in his pocket. In a taped statement, Wilkins admitted that he had taken the money from Pizza Hut and told officers that he had removed a layer of clothing after committing the offense. He also admitted to having taken money from the CVS. But he denied having had a gun. At trial, Wilkins stated that he had threatened the employees of CVS and Pizza Hut, but that he had not had a gun.

At the conclusion of the trial, the court found Wilkins guilty of two counts of robbery but not guilty of the two aggravated-robbery offenses. The trial court sentenced him to consecutive four-year terms of confinement.

In his first assignment of error, Wilkins asserts that the trial court erred when it sentenced him to consecutive prison terms without making the findings of fact required by R.C. 2929.14(E)(4). In *State v. Foster*, the Ohio Supreme Court held that that section was unconstitutional because it required judicial factfinding.² Wilkins contends that *Foster* is no longer valid with respect to consecutive sentences in light of United States Supreme Court's decision in *Oregon v. Ice*.³ But the Ohio Supreme Court has not directly addressed the effect of *Oregon v. Ice* on Ohio's sentencing law. Absent a contrary decision by the Ohio Supreme Court, we remain bound by the court's decision in *Foster* with respect to consecutive sentences. The first assignment of error is overruled.

Wilkins's second assignment of error is that the trial court erred in convicting him of robbery in regard to CVS. Wilkins contends that the evidence with respect to the offense at CVS was not sufficient to convict him of robbery in violation of R.C. 2911.02(A)(2). But Metz testified that Wilkins had indicated to her that he had a gun and that he did not want to hurt anyone. The evidence was sufficient to support a conviction for robbery under R.C. 2911.02(A)(2). The second assignment of error is overruled.

The final assignment of error is that the trial court erred when it imposed the costs of appointed counsel upon Wilkins. The judgment entries for the convictions stated that "[t]he defendant is to pay public defender attorney fees." Wilkins asserts that this was a violation of R.C.2941.51(D), which permits the trial court to order a defendant to pay appointed attorney fees only if the court has made a finding that the defendant has the ability to pay such fees. The state counters that the court was merely ordering Wilkins to pay the application fee that is required upon requesting a public defender. We agree.

² 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, paragraph three of the syllabus.

³ (2009), ___ U.S. ___, 129 S.Ct. 711.

Under R.C. 120.36(A)(1), a defendant who is provided a public defender must pay an application fee of \$25, unless the fee is waived or reduced. “If the person does not pay the application fee within that seven-day period, the court shall assess the application fee at sentencing or at the final disposition.”⁴ Because the trial court did not hold a hearing on Wilkins’s ability to pay for the cost of his counsel, it could order only that Wilkins pay the application fee referred to in R.C. 120.36(A)(1). We, therefore, modify the judgment entries to reflect the trial court’s order that Wilkins pay the application fee. The third assignment of error is overruled.

Therefore, we affirm the trial court’s judgment as modified.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HENDON, P.J., SUNDERMANN and CUNNINGHAM, JJ.

To the Clerk:

Enter upon the Journal of the Court on November 18, 2009

per order of the Court _____.
Presiding Judge

⁴ Id.